IV. MUST CONGRESS END THE DISENFRANCHISEMENT OF THE DISTRICT OF COLUMBIA? A CONSTITUTIONAL DEBATE

HOST: Good morning, ladies and gentlemen. My name is Steve Cook, and I am the Managing Editor of the *American University Law Review.* I am pleased to be able to take you through the remaining events of the day.

As a law school located in the District of Columbia, obviously we take great interest in issues involving the District. We are therefore especially pleased to host this important discussion regarding what role the District should have in our democracy.

Professor Gillette has illuminated the anomalous situation the District is in, and we have heard our first panelists discuss the nature of the right to vote and our Constitution. With that background, we are now ready to begin a debate over whether Congress can and should remove one of the anomalies found in the District, and that is the disenfranchisement of District citizens.

We are honored to have ten of the most respected and outspoken advocates on both sides of this issue with us here today serving as judges. They will later participate in a panel discussion in which they discuss the arguments presented by our debaters today.

Three of the six judges who will be presiding over this debate are sitting to my left. Beginning on my left is Mr. Steven Valentine, who is former Deputy Attorney General of the United States. To his left is Professor Anthony Farley of the Boston College School of Law.

To his left is Professor David Kairys of the Temple University School of Law. Sitting at the table to my right, and beginning on my right, is Professor Peter Raven-Hansen of the George Washington University Law School.

To his right, Professor Mark Niles of the American University, Washington College of Law. To his right, Mr. Todd Cox, who is Assistant Counsel to the NAACP Legal Defense and Education Fund.

These six judges, as I mentioned, will be the participants in our panel discussion this afternoon. At that time, they will discuss the arguments presented by the debaters today.

The panel discussion also will provide an opportunity for members of the audience to make any comments or ask any questions of the panelists, and we would ask you to reserve your comments until that time.

The format for the debate will be as follows: Each debater will have twelve minutes to present their argument, beginning with the

proponents of allowing voting representation for the District residents, and then alternating to the opponents of congressional action. After all four have argued their positions, a representative from each side will have an opportunity to present a six minute rebuttal.

Arguing in favor of congressional action to provide voting representation are Professor Jamie Raskin, to my immediate right, and Professor Paul Butler. We would like to especially thank Professor Butler for filling in for Congresswoman Norton. She had to chair a subcommittee hearing today in Congress, and will be joining us later this afternoon.

Jamie Raskin is a professor of law at the American University Washington College of Law. Professor Raskin is the former Assistant Attorney General of the Commonwealth of Massachusetts, and served as General Counsel to the National Rainbow Coalition under Jesse Jackson. He served on President Clinton's Transition Team in 1992 working on civil rights.

Professor Raskin's forthcoming article, "Is This America: The District of Columbia and the Right to Vote," will be published in the *Harvard Civil Rights and Civil Liberties Law Review* in the winter. That article helped trigger the current legal effort to end the disenfranchisement of District citizens.

Professor Paul Butler is a law professor at George Washington University and has served in the U.S. Department of Justice. Professor Butler has published in several law journals on topics dealing with race and crime. He writes a monthly column for *Legal Times* about local government issues.

Arguing against congressional action are Judge Stephen Markman, to Professor Butler's right, and Professor Adam Kurland. Judge Markman is currently a judge on the Michigan Court of Appeals. Prior to being appointed to the bench, he served as Assistant Attorney General of the United States. It was in this office that he authored the 1987 attorney general report addressing the question of statehood for the District of Columbia.

Professor Kurland is a professor of law at Howard University and has written extensively on criminal law issues and constitutional issues concerning the District of Columbia, including an article in the *George Washington University Law Review* entitled, "Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation."

Professor Mark Niles, sitting in front of me, will moderate the debate. Professor Niles.

PROFESSOR NILES (MODERATOR): Let us begin with Professor Raskin.

PROFESSOR RASKIN: I am going to take a second to thank the *Law Review* for organizing this conference, and all of the participants for your very serious contributions here today.

I owe a special thanks to my friend Gary Peller from Georgetown Law School who has characteristically preempted the left position and managed to position me squarely in the center of this debate, where I like to be. I do wholeheartedly disagree with him about one point. This case is not an uphill battle in any sense. I think it is a winner if we follow the whole trajectory of our constitutional history.

President Lincoln spoke of government of the people, by the people, and for the people.[88] Yet this foundational principle lays in tatters today in Washington. For here we have a community of more than half million people, loyal taxpaying, "draftable" American citizens who have no voting representation in the United States House of Representatives and no voting representation in the United States Senate.

If Congress moves to try to impeach President Clinton, the people of Washington will be the only community in the United States which will have participated in the election of President Clinton and yet will have no say whatsoever in either the impeachment or the trial or conviction of President Clinton. It is a complete shutout.

As with congressional votes on the federal budget and taxes, issues of war and peace, foreign policy, the confirmation of Supreme Court justices who are going to sit on the D.C. voting rights case, federal judges, as well as the D.C. budget and other local issues, American citizens living in Washington are totally disenfranchised and at the mercy of other people's representatives. This political tyranny will have been going on for two centuries as of the year 2000.

So here is the constitutional question: Are the hundreds of thousands of American citizens living in D.C. part of "We the People,"[89] the sovereign community that created the United States and that is the continuing source of all legitimate democratic authority, or are they outside of the democratic community?

Are Washingtonians first class citizens entitled to all of the constitutional rights enjoyed by other American citizens? Or are American citizens living in Washington entitled only to some rights and subject to the decision making of other people's representatives? Do the commands of equal protection and one person, one vote apply to

88. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* 1 DOCUMENTS OF AMERICAN HISTORY 429 (Henry Steele Commager ed., 9th ed. 1973).

89. U.S. CONST. pmbl.

citizens living in D.C., or do voting and participatory rights stop at the border?

There are two diametrically opposed ways of looking at these questions. There is what I will call the "straightjacket view" of the Constitution, and there is what I will call the "freedom charter" view. The straightjacket view is second nature to most of us, for we have internalized its assumptions. I will include myself, for I did not really open my eyes on the issue until last year when I began to look at the history myself and look at the cases as stepping stones to justice for Washington.

The straightjacket view is well captured by Judge Markman's extremely well written but totally wrongheaded discussion of D.C. statehood and the voting rights issue in the *Report to the Attorney General on the Question of Statehood for the District of Columbia.*[90]

The argument runs like this. I will synopsize it briefly and let him elaborate it. Because of the District Clause and our history, the rights of political participation enjoyed by other citizens simply do not and cannot apply to American citizens who live in D.C., who are governed directly by a Congress they may never join.

Under Article I, as Professor Gardner foreshadowed for us, the argument is that representation in Congress belongs exclusively to American citizens living in "the states." The Constitution and the nation were created by the states. It is a compact among them. No interloper, like the District of Columbia, may interfere in the states' compact.

Congress, according to Judge Markman, cannot even redraw the boundaries of the District to admit a new state or even to retrocede the land to Maryland because the borders of the District, the seat of government, have been fixed and frozen. So there is simply no way that D.C. residents can be represented in the House and Senate, certainly no duty for Congress to make it happen.

The fact that there is taxation without representation, conscription without representation, is irrelevant because as Judge Markman writes, District residents pay only those taxes paid by all other citizens of the United States.

Furthermore, he writes, District residents have voluntarily exchanged their vote for the privilege of living in the nation's capital. To reclaim it, he says, they need only move.

The fact that District residents are locked out presents no real

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90. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA (1987) [hereinafter ATTORNEY GEN. REP.].

problem for democracy, for as Judge Markman writes, "[I]t is difficult to seriously maintain that the residents of the District of Columbia have no voice in the national government. In fact, because of their proximity to the center of power, they have far more influence than the average American."[91] He explains, "District residents, while lacking a vote, have far more opportunities of contact with Members of Congress than the average state citizen who elects them."[92] According to this view, nothing can be done, nothing must be done, and certainly nothing should be done because disenfranchised Washingtonians already have more power than all other American citizens.

Now I want to suggest a radically different interpretation. It begins with a different reading of history. Our nation was conceived in insurgency and revolution against a king who denied Americans the vote. King George argued that Americans enjoyed virtual representation; that is, they were virtually represented by the English lords who would keep their interests in mind.

The Americans rejected that nonsense. The Declaration of Independence stated that governments justly derived their powers only from the consent of the governed directly, and noted that Great Britain had violated that requirement by forcing our people to "relinquish the Right of Representation in the Legislature, a Right inestimable to them."[93]

When the Constitution was written, it was not the states but "We the People of the United States" who secured the blessings of liberty to their "posterity."[94] The District of Columbia did not exist in 1787, and the people who lived on the land that we stand on today were part of the constitutional people who wrote the Constitution and bequeathed liberty to their posterity.

As Justice Sutherland wrote in *O'Donoghue v. United States*[95] in 1933,

> [t]he District had been a part of the states of Maryland and Virginia. It had been subject to the Constitution and was a part of the United States. The Constitution attached to it irrevocably. There are steps which can never be taken backwards. The mere cession of the district to the federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution.

Neither party ever consented to that construction. The District still

91. ATTORNEY GEN. REP., *supra* note 90, at 46.
92. *Id.*
93. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).
94. U.S. CONST. pmbl.
95. 289 U.S. 516 (1933).

remained a part of the United States protected by the Constitution.

With the District Clause, the Framers did not intend to disenfranchise anyone. The clause says nothing about voting. The purpose of it was to guarantee Congress police power, military jurisdiction over the seat of government to assure that the government would be safe in its dealings from foreign invaders and local mobs.

But none of the Framers intended for anyone to lose their representation. This fact is dramatically borne out by the history. For residents of the congressionally controlled district continued to vote for representatives in the House and Senate from Maryland and Virginia between 1791 and 1800. This is decisive, contemporaneous refutation of the proposition that the Constitution necessarily implied the disenfranchisement of people who lived in the capital city.

Indeed, amazingly to modern eyes, there were even representatives from Maryland and Virginia who lived exclusively in the District. Daniel Carroll, who lived in Rock Creek Park, served in both the Continental Congress and the first U.S. Congress from 1789 to 1791 as a representative from Maryland.[96] After 1800 John Love, a resident of Alexandria, which was part of the District, served in the 10th and 11th Congresses as a representative from Virginia from 1807 to 1811.[97]

So neither text nor history supports the weight of the proposition that the Constitution compels disenfranchisement. At this point then, the question simply becomes whether there is a right to vote and be represented that is being violated, and whether Congress must act to vindicate it.

Contrary to the straight jacket theory, two centuries of case law tell us that the District is not a constitution-free zone. In fact, the Constitution applies with full force here. Congress cannot establish a church. Congress cannot shut down the newspapers in the District. Congress cannot deny the right to a jury trial. Nor can it deny people the right to due process of law.

Equal protection applies with full force here. In 1954, when the Supreme Court handed down *Brown v. Board of Education*,[98] it also handed down *Bolling v. Sharpe*,[99] which struck down separate but equal schools in the District. The government had made the argument that even if school segregation is unconstitutional in the states, that is only in the *states* because the Fourteenth Amendment says that no *state* shall

96. *See* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, at 748 (U.S. Government Printing Office, Bicentennial ed. 1989).

97. *See id.* at 1393.

98. 347 U.S. 483 (1954).

99. 347 U.S. 497 (1954).

deprive any person of equal protection of the laws. The Supreme Court rejected that restrictive interpretation in *Bolling v. Sharpe.* It would be unthinkable, said the Court, that one standard of equal protection would apply to the people of the states and another to the people of the District.

Ten years later, the Court declared the equal protection principle that has come to define American democracy in our century: One person, one vote. In *Wesberry v. Sanders,*[100] the Court struck down malapportioned congressional districts, holding that the vote of all citizens must be of equal weight. Justice Black wrote, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in any way that unnecessarily abridges this right."[101]

The same year, in *Reynolds v. Sims,*[102] the Court struck down malapportioned legislative districts in Alabama. Chief Justice Warren said that citizens may not be deprived of votes based on where they live. Weighting the votes of citizens differently by any method or means merely because of where they happen to reside hardly seems justifiable. He elaborated, "Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives .... The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."[103]

The principle of one person, one vote is so critical today that you cannot vary the population size of districts even one half of one percent. Just three weeks ago, the Democrats and Republicans from the House were in court fighting about census sampling.[104] The Democrats said counting every citizen is so important that we should use census sampling to make sure we get it right. The Republicans said no; it is so important that we have to count each person physically.

Regardless of which method is better, both parties agreed that we have to count every person. But right in front of the noses of both the Democrats and the Republicans in the House, we have hundreds of

100. 376 U.S. 1 (1964).
101. *Id.* at 17.
102. 377 U.S. 533 (1964).
103. *Id.* at 567-68.
104. *See* U.S. House of Representatives v. Department of Commerce, 11 F. Supp. 2d. 76 (1998) (prohibiting the use of statistical sampling in conducting the census), *aff'd,* 119 S. Ct. 765 (1999).

thousands of American citizens who are present and accounted for, and yet, not apportioned and not represented for purposes of representation.

Now perhaps you agree that the Constitution applies, equal protection applies, but contend that the right to vote certainly can't apply because Congress governs the District. But the Supreme Court rejected that argument in 1970 in *Evans v. Cornman*.[105] There the Court struck down Maryland's disenfranchisement of U.S. citizens living on the NIH campus in Montgomery County in Maryland, a few miles from here.[106]

Maryland had argued that because Congress governs under Article I, Section Eight, Clause Seventeen (which is the same place where the District Clause is found), American citizens living there lost their democratic right to vote and participate in federal elections. But the Court rejected the claim that the federal character of the NIH campus terminated Maryland's obligations to grant citizens the right to vote. Maryland was "breaking the citizens' link to his laws and government, the link that is protective of all fundamental rights and privileges," the Court said.[107]

So just as with the NIH in Rockville, strict scrutiny must apply here in Washington, D.C. There are no compelling interests or reasons for denying people the right to vote. Or if there are, I would like to see our worthy adversaries state what they are, and then we can analyze the strength of their claims.

The D.C. Corporation Counsel filed suit against disenfranchisement on September 14th.[108] We believe the Court must declare the current regime unlawful. It can give Congress the chance to remedy the situation with all deliberate speed. But if it doesn't, the Court itself must order relief, just as it has done in the one person, one vote cases, just as it is done in the majority-minority voting district cases. We say that the most logical remedy is to have direct representation of the District in Congress as if it were a state.

Now you say that means that Eleanor Holmes Norton and—I don't know—Paul Butler could be U.S. Senators just like Jesse Helms and Strom Thurmond can be senators? The answer is yes, that is absolutely right. The District is treated presently as though it were a state for more than 500 purposes by the Congress of the United States.

The most familiar tag line you see in any federal statute is, "For the

105. 398 U.S. 419 (1970).
106. *See id.*
107. *Id.* at 422.
108. *See* Alexander v. Daley, 26 F. Supp. 2d 156 (1998).

purposes of this statute, state includes the District of Columbia." It is treated as a state for constitutional purposes as well.

The Full Faith and Credit Clause: District judgments are treated with full faith and credit by the states and vice versa. The Diversity Jurisdiction Clause: citizens of the District are treated as citizens of a state for the purposes of suing across state lines and invoking federal jurisdiction. There are other plausible remedies as well, including the Maryland-based voting option.

But direct representation is the sensible, the elegant, and the constitutionally compelling solution to the problem of disenfranchisement in Washington, D.C.

Thank you.

PROFESSOR NILES (MODERATOR): Judge Markman.

JUDGE MARKMAN: Thank you. I too would like to thank American University for sponsoring this conference. I would like to thank Professor Raskin in particular for his intellectual efforts which have culminated in this conference, although, one hopes, not in a successful lawsuit.

With respect to several of the comments attributed to me by Professor Raskin, let me correct the record and note that, by and large, these are quotations from James Madison. But I am honored nevertheless by the association.

Article II, Section Five of the United States Constitution provides that no person shall be eligible to serve as President who has not attained the age of thirty-five years. Several years ago, I recall, there was a constitutional scholar who argued that this language really did not mean that a President had to be at least thirty-five years old, but merely that he had to have reached an age reflecting a maturity level compatible with the maturity level reflected by thirty-five years of age in 1787 when the founders drafted the Constitution.[109] Perhaps that equivalent age today was something less or something more than thirty-five years.

I recall this analysis because once again it appears that there is no language in our Constitution that is sufficiently clear that it cannot be rendered unclear by a creative and determined scholar; there are apparently no barriers to governmental conduct that are anything more than "parchment barriers," awaiting deconstruction by an innovative professor of law.

In the case at hand, of course, the language is that of Article I,

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109. *See* Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989).

Sections Two and Three, which address the composition of the Congress: a House to be composed of members chosen by the people of the "States" and a Senate to be composed of members from each "State." The District of Columbia is not a "State." To Professor Raskin, however, this reading of the Constitution is an overly "literal and pinched," a "straightjacketed" reading of an "ambiguous" phrase.

In assessing Professor Raskin's argument, which apparently has been endorsed by the legal officers of the District of Columbia, I am also reminded of another constitutional argument that I heard several years ago in which some opponents of a proposed constitutional amendment restricting abortion contended that the amendment violated the Free Speech Clause of the First Amendment. Never mind that this would have been the first unconstitutional amendment in our country's history; what such a mindset illustrates is the propensity, reflected also in Professor Raskin's initiative, to identify a single constitutional value, elevate it to a status of first among equals, and then subordinate before it all competing constitutional values.

The Professor instructs us that the language of Article I, concerning the nexus between congressional representation and the "States," must be "informed" by the Equal Protection Clause of the Fourteenth Amendment. Yes, I agree that equal protection is a fundamental constitutional value, but so is the value of federalism, so is the value of a written constitution delimiting the powers of government, and so is the concept that principles sometimes need to be balanced and placed in some equilibrium in the establishment of a workable, constitutional republic.

Why the meaning of the word "State" in Article I must be "informed" by the principle of equal protection, as opposed to being "informed" by the principles of federalism, or perhaps "informed" by nothing other than a dictionary is utterly unclear, except that this leads to the results that Professor Raskin would prefer.

In this single-minded pursuit of his own favorite constitutional principle (and again, I think it is a fine one, too), I would respectfully suggest that Professor Raskin pays little regard to other principles which—perhaps inconveniently—also undergird our Constitution, not the least of which is what Justice Marshall described in *Marbury v. Madison* as the "greatest improvement" of all of our political institutions—a written constitution, unchangeable by ordinary means.[110]

Indeed, Professor Raskin also divines in support of his proposal an

110. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (determining that the Constitution is the paramount law of the nation, and any legislative act repugnant to it, is void).

assortment of *new* constitutional principles that appear nowhere in James Madison's Constitution. For example, he invokes the "norms of the Constitution," including what he describes as the principles of an "equal part in political life," an "equal stake in government," "equal citizenship," and "equal respect," most of which appear highlighted in his article as if they had come directly from the Federalist Papers.

Now lest I be misunderstood, let me acknowledge that these are all very admirable concepts, they all describe political science ideals, and perhaps they represent goals toward which our society ought to aspire. But they are not constitutional standards, and they are not properly invoked in a court of law, because they simply are not part of our Constitution.

Yes, "equal citizenship" may be a worthy, general principle of government, but it is a principle represented only imperfectly in our Constitution because there are other worthy principles as well.

We do not mandate uniform voter registration laws under he principle of "equal citizenship" because federalism is also an important consideration; we do not prohibit wealthy candidates from outspending their less well-endowed opponents under the principle of "equal citizenship" because free speech is also an important consideration; and we do not forbid the Federal Government from restricting the political participation rights of its employees under the principle of "equal citizenship" because the integrity of the governmental processes is also an important consideration. In other words, there are competing principles with equal protection that the Constitution, and I believe most Americans, also consider to be important.

Now if Professor Raskin wants to seek to elevate his own principles of government to constitutional status, or if he wants to seek to ensure that these principles always trump other principles and provisions of the Constitution, more power to him.

When he is done with the matter of District of Columbia representation, he may also want to embark upon eliminating the electoral college, the equal representation of the states in the Senate, the constitutional amendment process, and indeed a Union in which the rights of citizens are respected differently by the different states. The District of Columbia could have sought to amend the Constitution to provide the District with representation "as if" it were a State; sought to amend the Constitution to provide the District with actual statehood; sought to amend the Constitution by repealing the Twenty-third Amendment; or sought retrocession of parts of the District. They have chosen not to undertake these efforts because they are judged to be politically unattainable. That is, their pursuit of a democratic process,

which is *not* a part of the Constitution, has been frustrated by the *real* democratic processes of the Constitution.

So, in the modern manner, they are now seeking to replace the decisions of the representative branches with those of a federal judge. Whether they will succeed in finding a judge who is prepared to say that, with respect to Article I, "State," does not mean "State," before they find a judge who will consider imposing sanctions for this abuse of the judicial process, is anyone's guess. In particular, it is disappointing that the leadership of the nation's capital should accord so little respect to the language of our "supreme law," which brought both them and their country into being.

The District's brief is a policy argument disguised as a constitutional argument. While such policy is, in many respects, a compelling one, the litigation itself is not. We see here the constitutional kitchen sink, a veritable string-cite of constitutional allusions, invoked on behalf of Professor Raskin's litigation—racial gerrymandering and apartheid, the "badges and incidence" of slavery, the right to travel, poll taxes, intentional discrimination, one person, one vote, the Fourteenth Amendment, the First Amendment, the Thirteenth Amendment, the Fifth Amendment, the Twenty-fourth Amendment, and much, much more. Professor Raskin's article provides a dazzling whirlwind tour of the Constitution, giving us not one, not two, not three, but *six* separate arguments as to why representation of the District is compelled.

To all of this, I can only repeat: first, Article I, Section Two limits representation in the House to members chosen by the people of the "States"; second, that Article I, Section Three and the Seventeenth Amendment limit representation in the Senate to members chosen from the "States"; third, that the Twenty-third Amendment enables the District to participate in presidential elections only "as if" it were a "State"; and fourth, that Article V provides that no "State" shall ever be deprived of its equal suffrage in the Senate, something that almost certainly would be accomplished by allowing suffrage in that body to a non-"State." Article V preserves forever the federal aspect of the national legislature against future nationalizing impulses. If all of this language is insufficiently clear, then I can only suggest that the Framers were remiss because they should have appended to their constitutional language, "and we really mean all of this," and because they failed to add several exclamation marks to the end of their work.

The original purposes of the "Seat of Government" Clause were several: (a) to ensure that the national government could provide for its own security and not to have to appeal for assistance to local authorities; (b) to ensure that no state would be perceived as the first

among equals by virtue of having within its boundaries the nation's capital; and (c) to avoid what George Mason described as a "provincial tincture" to the deliberations of the Congress[111]—in other words, to ensure that the national government was independent of the states just as the states were to be independent of the national government. Taken together, these demonstrated the "indispensable necessity" (in Madison's words) of a "seat of government" separate and distinct from the States.[112]

More recently, the unique status of the District has been justified on the grounds that the District is the symbol of our nation, both to our own citizens and to the world, and that its maintenance and security ought not to be left to what is essentially a local government.

While reasonable people can differ on the current merits of these various rationales for the District of Columbia—Professor Raskin, for example, describes the District's status as "obsolescent"—such differences are not a proper basis for circumventing the procedures for change contained within the written Constitution. Indeed, I would respectfully suggest that the current debate is more about jurisprudential and constitutional probity than it is about the substantive merits of according representation to residents of the District. This is made particularly clear when Professor Raskin speaks approvingly of the need to "keep faith with the evolving meaning of constitutional concepts." Clearly, adherence to the "original meaning" of the constitutional concept of statehood will not suffice here.

Finally, let me say that I am cognizant that Professor Raskin, without doubt a highly distinguished scholar, has identified several decisions of the Court which suggest that, for some statutory and perhaps even some constitutional purposes, the word "State" may be broad enough to encompass the District of Columbia. Whatever the merits of these decisions, they are exceedingly narrow; they have operated almost exclusively to sustain Congress' authority to legislate for the District under Article I, not to compel the Congress to do anything; and they have focused upon policies, in which there is little practical reason to distinguish between the states and the District of Columbia. In particular, the Court has refused to interpret "State" to include the District even with respect to the principal statute used to enforce the guarantees of the Fourteenth Amendment, much less for purposes of the Amendment itself. It is beyond imagining that the cases cited by Professor Raskin will persuade the Court that the Connecticut

111. *See* ATTORNEY GEN. REP., *supra* note 90, at 55 (remarks of George Mason).
112. *See* THE FEDERALIST NO. 43, at 288 (James Madison) (J. Cooke ed., 1961).

Compromise—which was at the heart of our Constitution and which has defined American federalism for more than two centuries—ought to be reversed and that the United States should now come to be what one U.S. Senator has described as the "United States and Other Assorted Things of America."

Ladies and Gentlemen, it is understandable why advocates of voting representation for the District of Columbia would feel frustrated by the various constitutional barriers to its achievement. Nevertheless, for the reasons that I have set forth, I believe that the pending litigation is ill-advised and, if successful, would distort the plain meaning of our supreme law. While District of Columbia *residents* share all of the essential characteristics of citizens of the states, the *District of Columbia* itself does not share the essential characteristics of the states. While the equal protection principle compels that citizens of the District be represented in some manner in the national legislature, the federal principle compels that they do so only as citizens of a bona fide state.

Thank you very much.

PROFESSOR BUTLER: Good afternoon. I am going to make three points about the right to vote in the District of Columbia.

First, I am going to discuss the importance of having a place at the table. Second, I am going to discuss how a court might choose between the various competing values that Judge Markman discussed. Third, and this is a warning, I am going to discuss race and the District of Columbia.

I should get to the part about race in about seven minutes if anybody wants to leave. First, the importance of a place at the table: why is it worth our time and our energy to fight for one or two votes in a 100 person body, or for one full vote in a body of over 400 members?

The best evidence is the consequences of not having a place at the table. This is how they do us when we are not there. "They" means the Senate. "We" refers to the citizens of the District of Columbia.

How they do us is they expose the petty democracy that we think we enjoy as a joke, a whim, a munificence that exists only at their pleasure. We believe that we have a city council, and we believe that we have the right of self-governance. But sometimes Congress makes it plain that that our rights are as transparent as the worn flag that flies over the District building.

There are a number of examples. Think of fifteen years ago when "We the People" determined that we didn't want to criminalize consenting sexual relations between adults, including when those adults happened to be members of the same gender.

Some members of Congress were not particularly pleased with that

exercise of self-governance, and so they did something that they wouldn't have the power to do in any of the jurisdictions that they represent. They reversed the will of the people, and Congress summarily dismissed the law.

Or think of a few years ago when a senator's aide was tragically murdered. The Senator believed that the accused person should receive the death penalty. There was no death penalty in the District of Columbia at the time.

"We the People," in our considered judgment, had decided that we didn't believe our government should punish its citizens by killing them. The Senator thought differently, and he forced a public referendum on the issue in which the people soundly defeated the death penalty.

The Senate doesn't take no for an answer, at least not as an answer from "We the People" of the District of Columbia. At least two senators have indicated that if we don't change our minds, then they will dictate us a death penalty.

I could go on and on: school vouchers, adoptions, other family law issues, and especially criminal law. It is telling that several of these examples involve the criminal law. Congress has been especially heavy handed in that area of law and politics. They have recently forced the District of Columbia City Council to adopt federal sentencing provisions for our cities when we already have the toughest sentencing laws in the country.

The result of that heavy handedness is that over fifty percent of the young black men in our city are under criminal justice supervision right now. In the capital of the freest nation in the world, over half of the young black men are either in prison, on probation or parole, or awaiting trial.

The citizens of this capital cannot elect judges or a prosecutor. We cannot appoint judges or a prosecutor. We don't even have ultimate say about the laws that punish us most severely. So that is how they do us. That is the consequence of not having a place at the table.

Now the congressional power that allows them to do us originates in the Constitution, and that power wouldn't necessarily change even if the principle of, one person, one vote, was respected. But at least D.C. would have a place at the table.

If we had a seat at the table, we could horse trade with the big boys and girls. This is an especially important power in the Senate. But look at the influence of small states, like our neighbor West Virginia. The Senate is designed to ensure that the residents of smaller jurisdictions in that body are not the victims of the tyranny of the majority.

One other consequence of not having that place, another way they do you: they even limit what you can hope for. They limit what you can aspire to be in the petit democracy.

So if the mayor you elected asks his assistants to petition the Congress for a vote, they tell him no, you can't do that. If the mayor asks his assistant, his chief lawyer, to file suit because he believes that the lack of representation is unconstitutional, they tell him no, you can't do that. They pass a law against being uppity.

There is legislation pending in the House that would forbid the city from spending any money on this litigation, litigation to secure our voting rights.[113] We pay more local taxes in the District of Columbia than citizens in forty states, and they don't even let us spend our money the way we want to.

There is nobody in the room with a vested interest to tell them how low down that is. They make it very clear that they want to keep it that way. It is like that episode on "All in the Family" when Edith gets fed up finally with Archie's tyranny. She stands up for herself, and Archie says, Edith, sit down and shut up, because he can. That is what the Senate says to the District, because it can. But no lie can live forever. One day Archie got his. I hope one day the Senate will get its. I hope.

Let me share a secret. I wasn't actually very optimistic about the chances of the litigation, given the make-up of the federal courts these days. But when I learned that the Senate was so scared of the lawsuit that they didn't even want the Corporation Council to litigate it, I was encouraged. So if they think that we have a fighting chance, why shouldn't we?

The second point has to do with how do you interpret the Constitution given these competing values that Judge Markman mentioned? How should a court choose? Is the District Clause a straightjacket?

One way a court might choose would be to think about the important relationship between political participation and freedom and equality, the bedrock principles of our form of government. When a group is not fully enfranchised, they don't even have a chance to make their case.

They don't even have the opportunity to bring their claim. As it is, in the U.S. Senate, there is nobody with a vested interest in the District of Columbia. There is nobody to even introduce a bill making the case that it is unfair to tax people without representation.

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113. *See* H.R. 4380, 105th Cong. (1998) (seeking to enforce a provision that would prohibit the use of funds to be used in a civil action to provide the District with voting representation in Congress).

So the last time a bill was introduced to secure voting rights in the District, it failed by a margin of two to one. If the Senate is not willing to ensure full voting rights in the District of Columbia, then the courts are all we have left. If the courts say they can't help us, where do we go?

So when we think about the value of democratic participation, I respectfully suggest that the Constitution ought to be interpreted consistent with this fundamental value.

To understand why, think, again, about that criminal law example. We can't choose our judges or our prosecutors. We can't vote at least for our federal representation. We are subject to laws that are authorized by somebody else. And these laws lock up our citizens longer than anyone else in the United States. That sounds like a colony to me. "Is this America?" really is the key question. It doesn't sound like America to me.

Certainly, there are other competing values. Yet, when I listened to Judge Markman, his remarks reminded me of the debate about *Brown v. Board of Education*.[114] There were various constitutional values at issue in that case as well. One was the equal protection argument, or value, that little Miss Brown endorsed.

Another was the value of freedom of association. Some legal scholars argued that the Supreme Court's decision in *Brown* privileged equal protection of the little girl over the right of white people not to associate with black people. Those were values. The Court chose one value over another. Thank God. But some academic critics faulted the Court, because it failed to articulate some neutral basis for privileging one value over another value.

One final point on the issue of how a court decides a case. I'm what you call a legal realist, and I wonder how many of you are. You can know whether you are or not by answering this question.

Is there anyone who really believes that the way a court will decide this issue is by looking at Article I, Section Three and interpreting the text? I probably shouldn't say this at a law school, but the fact that I am speaking at a law school is no reason to leave my common sense out of this.

I don't think that that is the only way or the main way the courts decide cases. I think a lot of court decisions are policy decisions. Or to use Judge Markman's phrase, I think a lot of court decisions are policy decisions disguised as law. The legal argument is about whether the District is enough like a state to elect representatives to the federal legislature. If the court wants to accept Professor Raskin's fine

114. *See* 347 U.S. 483 (1954).

argument, it can.

The last point, very quickly: race and the District of Columbia. The District would be the only majority African American jurisdiction represented in the Senate. Dare we consider the relationship of the denial of one person, one vote in the District of Columbia to other historical efforts to exclude African Americans from exercising their franchise?

What is the relationship of taxation without representation to the poll tax and to the grandfather clause and to the literacy test and to the all white primary and to the gerrymandered districts and to the current assault on the Voting Rights Act?

The lesson of history is that there has always been strong opposition to African Americans exercising the franchise. The last time there was a significant black presence in the Senate was 100 years ago during Reconstruction. White violence was the main tactic employed to end black power in the Senate. They hanged black people who tried to vote. The tactic was very successful. Since Reconstruction, there has never been more than one African American in the Senate.[115]

I am not suggesting that people who are opposed to voting rights in the District are racist, not necessarily. But I am saying they at least ought to be concerned about the company that they keep. They have some friends in low places.

All we want, Martin Luther King said, is what you wrote on paper. What is written on the paper of the American democracy is an idea of freedom and an idea of self-governance that is embodied by the principle of one person, one vote. It is part of the American Dream. Langston Hughes asked what happens to a dream deferred. Does it fester like a raisin in the sun, or does it explode?[116]

The dream is festering in the District of Columbia right now. One day it will explode.

PROFESSOR NILES (MODERATOR): Professor Kurland, I have been told you get an extra three minutes for this, in the interests of equity and equal protection.

PROFESSOR KURLAND: It is nice to know that the people running the debate are interested in equity because I think Judge Markman and myself are interested in equity as well.

My name is Adam Kurland. I am a professor of law at Howard University, and I also want to thank American University for putting on this symposium, which touches on some very important legal,

115. One hundred years later, in 1999, there are none.

116. *See* Langston Hughes, *Harlem, in* CROSSING THE DANGER WATER: THREE HUNDRED YEARS OF AFRICAN-AMERICAN WRITING 508 (Diedre Mullane ed., 1993).

philosophical issues—legal, at least, in the sense that the topic deserves discussion in a law journal. I am not convinced that it really belongs in a court of law.

When I get to minute eight or nine of my discussion, I will try to directly address what appears to be the topic of debate for this session: must Congress end the disenfranchisement of the District of Columbia? It is something that really was only briefly touched on by Professor Raskin.

The topic is the second part of the trilogy concerning what is the appropriate remedy concerning the disenfranchisement of voting rights of the citizens of the District, whether it be a lawsuit, congressional remedy, or a constitutional amendment.

I'll get to that in a minute. I want to spend a minute talking about how difficult and how potentially dangerous it is for me even to be speaking here today.

I have done this before with the D.C. statehood issue, and I have had the pleasure of being grilled by Representative Norton at a congressional subcommittee hearing, so I am used to this. I thought, this is like the Washington Generals and the Harlem Globetrotters, that you are being sent out to put on a good show and lose.

We have six people, technically, judging the debate. But I can guess that in the larger audience, regardless of what Judge Markman and I say, that we will be like the Washington Generals—just kind of avalanched under another Harlem Globetrotter victory.

I find it ironic because I am certain that the lawsuit will fail. That doesn't make me an opponent of democracy in any sense of the term. I just think that the lawsuit will lose. To the extent that there is any political gain from the defeated lawsuit, to the extent that it provides impetus on Capitol Hill for anything, that is a different matter.

Something else struck me. In reading Professor Raskin's draft of his article that was sent to me, I am identified on page thirty-seven as a statehood opponent. Now Jamie and I are friends. But the only thing that I could imagine as to why he would put that in print is because of an article I wrote in 1992 in the *George Washington Law Review* entitled, "Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation."[117]

The sole point of the article concerned the constitutional inconvenience of getting around the Twenty-third Amendment, which,

117. Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475 (1992).

after all, was the constitutional amendment that provided the District's participation in presidential elections and the electoral college.

When the statehood scenario was being debated, the theory was, wait a minute, we are going to shrink the District down. We'll make the federal District of Columbia the little enclave where the President lives and maybe the homeless in Lafayette Park, and we'll turn the rest of it into New Columbia.

The article basically says that okay, that is fine and good. If you want to shrink the District of Columbia, that is fine. Voting rights, equal representation, I cherish those values, and that is very important. But I said, wait a minute, if you do that, that little shrunken seat of government will be entitled to the three electoral votes under the Twenty-third Amendment.

You want to give Chelsea Clinton, I don't know if she is eighteen yet, but she is out in California. I don't know what her voting residence is. But the Clintons don't have a house in Arkansas. They can easily change their voting address to the District of Columbia. The people who live in the White House could get three electoral votes. That is just a constitutional, inconvenient fact.

So Professor Raskin and others said, no, no, no, we don't want to have to hassle with repealing the Twenty-third Amendment. We'll just delete it by saying that we will just get the same Congress that will pass statehood or get the statehood ball rolling—and just delete the technical statutory provisions that bring the electoral college into existence in the District. I mean, the technical statute—I don't have the cite to it.[118]

But there is a statute that says the District gets its three electoral votes, and it is winner take all, so on and so forth.[119] So the theory of the "statehood by legislation" proponents was, in essence, we will get rid of the Twenty-third Amendment, a cherished voting right that gives the constitutional rights of the citizens to vote for President—we'll just wipe it out by eliminating by legislation the statutes that bring the voting rights of the Twenty-third Amendment into effect.[120]

My position is that that is nonsense. The Twenty-third Amendment is

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118. The current federal statute authorizing the District of Columbia to enact selection procedures for its participation in the Electoral College is the Act of October 4, 1961, Pub. L. No. 87-389, 75 Stat. 817 (1961). For a further discussion, *see* Kurland, *supra* note 117, at 487 & n.42.

119. *See* D.C. Code § 1-1314(a)(2) (1992) (providing that the presidential candidate receiving the highest number of votes is entitled to all of District's electoral votes).

120. *See* Kurland, *supra* note 117, at 486-87 & n.42 (citing articles by Professors Philip Schrag and Peter Raven-Hansen endorsing the concept that the Twenty-third Amendment is not self-executing and that the District's participation in electoral college and presidential elections could be repealed by statute).

a significant constitutional barrier. It mandates that the seat of government of the United states, no matter how small, is entitled to participate in presidential elections through the electoral college. You just can't get around it. You have to repeal it by constitutional amendment. Anytime anyone suggests that a constitional amendment is required for any purpose relating to D.C. statehood, the odds are good you will be branded an "opponent" of statehood.

I find it ironic that Professor Raskin, in championing this theory of equal protection, privileges and immunities, so on and so forth, this whole specter of inclusive voting rights, is so willing, when it suits his purposes, to throw the Twenty-third Amendment overboard when it becomes an inconvenience.

The other point that I want to make before I get onto the main subject at hand is that I speak at peril, tongue in cheek. When I reviewed a copy of the lawsuit, I noticed that one of the named plaintiffs is Pat Swygert, who is President of Howard University.[121]

So I am the only person on the panel who, in the exercise of academic freedom and free speech, is saying something that might be construed as mocking the person who in some sense signs my paycheck. Now President Swygert is a firm advocate of free speech and of academic freedom, and I know these proceedings are being taped and videotaped for posterity. So let there be no question President Swygert, I am in no way implying that you don't favor free speech and academic freedom.

In any event, I come at this whole issue in an odd way. I am, as they like to say on CNN or MSNBC, one of those ubiquitous former federal prosecutors. My academic interests are mostly criminal law and criminal procedure. But I was a history major and loved the electoral college. I became involved in the statehood issue as an academic topic solely as it related to the Twenty-third Amendment issues with regard to the electoral college.

Now as a former prosecutor in dealing with this debate, what prosecutors sometimes do when they are trying to make their closing arguments, they listen to everything that was said before in defense closing arguments, and to try to show you how ridiculous and off base the defense position is with regard to what they are asserting.

I know that these are the plaintiffs in the lawsuit. But a prosecutor would have listened to both the first panel and this panel and said wait a minute. We are talking about voting representation and the

121. *See* Alexander v. Daley, No. 98, CV-02187 (D.D.C.), ¶ 48 (listing H. Patrick Swygert, President of Howard University, as plaintiff).

constitutional issues.

But what I have heard from my opponents? Abe Lincoln, the impeachment of President Clinton, Stokely Carmichael, land reform, Rock Creek Park, willful negligence, straightjacket, 1968 riots, *Washington Post*, and Edith Bunker and "All in the Family."

Now what do these things have to do with the explicit constitutional commands concerning this not very complicated issue that the Constitution and the principles of federalism say that in order to be represented in Congress, the House of Representatives and the Senate, you have got to be a State? It is a simple as that.

Mark Plotkin laughed. I talked to him at the break for a minute. The summary of what this case is all about is going to be decided in—I don't know if it will be two or three paragraphs, but it could be resolved that simply.

The judge's law clerk might be interested in some of the constitutional issues. But it is going to be resolved on that basis, that the proper forum is not the courts, not even Congress, but the constitutional amendment process.

So the short answer to the topic of this debate, must Congress end the disenfranchisement of the District of Columbia, the answer is it can't. Congress can set the statehood process in motion and the wheels in motion to grant statehood and then go through all of the other constitutional obstacles on that basis. But Congress can't pass a law that says that the residents of the District get votes for Congress and votes for Senator.

I'll spend a minute talking about that in a little while. I wanted to add one other thing that goes along with the inconvenient constitutional truths that Judge Markman spoke about. The District Clause also says that Congress can exercise exclusive legislation in all cases whatsoever over such district as made by cession of particular states and acceptance by Congress, becomes the seat of government of the United States.[122]

So the District Clause itself makes it abundantly clear that the District is not a state under the Constitution, in addition to all of the other constitutional provisions which talk about "State," and the Twenty-third Amendment that says the District gets its three electoral votes as if it were a state.

But the District Clause itself differentiates the seat of government of the United States as a district that is going to be created out of the cession by particular states. The District of Columbia—or actually, that

122. *See* U.S. CONST. art. I, § 8, cl. 17.

isn't even the constitutional term. The constitutional term is, the "Seat of Government" of the United States,[123] where we are right now, is not a state for the purposes of representation in the national legislature.

If that position is to be changed, and I agree that there are strong philosophical, legal, and human rights arguments that say that the situation needs to be changed, the redress is to amend this inconvenient little thing called the Constitution.

I was talking with Professor Raven-Hansen before at the coffee this morning. Maybe he'll have a comment on this later. But I asked him, what he thinks about the chance of success of the lawsuit. He said, well, it is probably going to lose in the political sense. I agree the law suit will lose, and I believe this particular law suit should not be used to make a political statement. Whether some lawsuits may be properly used for political purposes is another matter. This particular lawsuit is a political document that has redress in other more appropriate forums.

One of the panel members on the first panel said, well, if I was in the Civil Division of the U.S. Attorney's Office or the Department of Justice, I might handle the case. That means some lawyer in the Justice Department, and perhaps maybe some private counsel, time, money, and effort is going to have to be expended responding to this lawsuit.

Again, when all is said and done, I take issue with Professor Butler here. This really isn't a situation of policy masquerading as law. There are some terms in the Constitution that simply are not ambiguous.

There is the constitutional provision Judge Markman discussed—thirty-five years old, maturity level.[124] Other people have argued that you can't imprison a pregnant woman because the fetus, if it is a person, has Fourteenth Amendment rights, and you are putting that person in prison and so on and so forth.

That might be the stuff of constitutional parlor games, and even some serious discussions in law review symposia. It really isn't the stuff of a lawsuit. I don't think the senators are concerned about losing the lawsuit. I think it is silly for them to try to micromanage to the extent where they are going to say we are not going to let you have the money to litigate the lawsuit.

I think what that does is give more credit to the lawsuit than it deserves, and it allows Professor Butler to make a very plausible argument that it seems that these guys must be afraid of something. I think they are just overreacting, like they do on a lot of things, and they want to make this a symbolic protest concerning what they believe is a

123. *See id.*
124. *See* U.S. CONST. art. II, § 1, cl. 5.

waste of money on this lawsuit.

Well again, the lawsuit is going to lose. It is going to lose because there is no legal basis for the lawsuit. End of story.

Now with regard to—in my last two minutes here—the issue concerning must Congress end the disenfranchisement of the District of Columbia, there was some discussion in the first panel. Professor Raskin does a terrific job in coming up with all sorts of strains of constitutional cases which arguably support the position that he wants, if you ignore that other strain of cases that the Supreme Court has decided which says that voting rights are really not fundamental.

The answer to the question is that the reason why the Supreme Court doesn't directly say that voting rights are fundamental is that the structure of our federalism is set up in such a way that voting rights, to a large degree—and they have been modified by other constitutional amendments—come from the states.

Even the hallowed Fourteenth Amendment, if you take a look at the language, did not talk about directly giving the rights to vote for Congress. It basically said that, well, if you are going to—if you are going to limit voting rights, it says the representatives will be apportioned among the several states according to their respective members. But when the right to vote in any election for president, the choice of electors or representatives is denied or in any way abridged, the basis of representation therein shall be reduced in the proportion of the number of such male citizens—so and so forth. So even the Fourteenth Amendment recognized that if some states were going to have restrictive voting rights, all it could do was essentially penalize them by taking away representation, as opposed to saying that you had to do something in a particular way. I think some loose ends need to be tied up. Professor Raskin, in this article,[125] and Professor Raven-Hansen as well,[126] talk about voting rights for American citizens living abroad.[127]

If Congress can do that—American citizens living abroad, if they can vote in congressional elections as if they still resided in their state of last domicile, why can't Congress do the same thing to the representatives of the District? I think that is one of the more difficult legal issues that

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125. *See* Raskin, *supra* note 1, at 64 (arguing that Congress acted with a presumed indifference or hostility to the rights of unpopular groups, by extending full voting rights to citizens living abroad, while denying them to citizens of the District).

126. *See* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 185-86 (1991) (arguing that if Congress has the power to enact legislation allowing citizens residing abroad to vote in federal elections, it at least has comparable authority to enact legislation allowing District residents to vote in a New Columbia elections for federal office).

127. *See* 42 U.S.C. § 1973ff-1 (1988) (directing the states to provide procedures for people who live overseas to vote); *see also id.* § 1973ff-6 (defining "states" as including the District of Columbia).

needs to be addressed. I think it is distinguishable.

There are a couple of court cases that Professor Raskin cites in which the distinction has been made between citizens moving from place to place within the United States, as opposed to moving abroad where they don't get voting rights in their new country until they become citizens.[128]

So there are some legitimate legal issues that need to be thought of with regard to that. On the other hand, giving District citizens the right to vote in Maryland doesn't really solve all of the issues that we are talking about here because the body politic in the District of Columbia isn't merely an appendage of Montgomery County.

So I'm not sure that would be a satisfactory response, even if Congress could do it. I don't think they could. The *Evans* case[129]—one of the members of the *Law Review* ran out and got me a copy at my request—was discussed in the first panel.

Evans makes it real clear that, with regard to the District and the other federal enclaves—the situations are different in fundamental ways. Appellees in *Evans* clearly lived within the geographical boundaries of the state of Maryland. The Court talked about how the people residing on the NIH grounds had to get Maryland license plates on their cars, send their children to Maryland public schools, and so on and so forth.[130]

There is a difference in the District Clause. It is recognized in the *Evans v. Cornman* case and in others, that there is a difference between the seat of government of the United States and those other federal enclaves that are *within* other states.

My time is up. Thank you very much.

PROFESSOR NILES (MODERATOR): Now I guess we have six minutes from the first side, the D.C. voting rights side.

PROFESSOR RASKIN: I am afraid it is not enough merely to say that the Constitution solves this problem, but then do no constitutional analysis to explain why or how.

If we are serious about the Constitution, let's take the Constitution seriously. Let's analyze what it says; let's analyze the way the Supreme Court has interpreted the document as a whole.

Now the Twenty-third Amendment, which Professor Kurland discusses, is perfectly consistent with what we are saying.

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128. *See, e.g.*, Igaruta de la Rosa v. United States, 842 F. Supp. 607, 611-12 (D.P.R. 1994) (upholding the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act against due process and equal protection claims).

129. 398 U.S. 419 (1970).

130. *See id.* at 424-25.

Our opponents say you can't treat the District as though it were a state, except there is language in the Twenty-third Amendment itself which says that for the purposes of presidential elections, the District should be treated as if it were a state. This expresses what I find to be a clear constitutional preference for voting in the District of Columbia, as well as a textual indication that all of the treatment of the District as a state is appropriate. Indeed, Congress treats the District as though it were a state for essentially every other constitutional, statutory, and programmatic purpose.

The reason that the text needs to be explicit for presidential elections is precisely because of Professor Kurland's beloved electoral college, which requires the organization of electoral college in each jurisdiction that is going to be electing a president.

So how in any way does that refute the idea that one person, one vote applies in the District of Columbia? The Twenty-third Amendment is a floor, not a ceiling, and the Ninth Amendment makes it certain that the enumeration of the right to vote in presidential elections may not be construed to deny or disparage the right to vote in congressional elections.

There is an interesting parallel with the Twenty-fourth Amendment, which banned poll taxes in federal, but not state, elections. This was in 1964, but two years later the Court struck down the poll tax in *state* elections, emphasizing that the historical meanings of that equal protection *do* change.[131] Just as the Twenty-fourth Amendment changed the meaning of equal protection, so did the Twenty-third Amendment. Both Professor Kurland and Judge Markman say you have got to be in a state to vote. On the contrary, Congress has enfranchised millions of people who don't live within states (and are not seen as state residents in state law) to vote through the Overseas Citizens Voting Rights Act.

If you go back and you read the legislative history of the Overseas Citizens Voting Rights Act, it is perfectly clear that Congress thought there was a constitutional *obligation* to make certain that when people leave the United States to go serve the country abroad, the way they come to Washington to serve the Federal Government in some cases, they continue to possess the right to vote, which is why millions of Americans in all of the other continents of the world continue to enjoy the right to vote that is denied to people who live on the mainland in the District of Columbia.

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131. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1996) (holding that state poll taxes violate the Equal Protection Clause of the United States Constitution).

I don't find your attempt to wave off the Overseas Citizens Voting Rights Act—by saying admittedly it is a difficult problem—remotely convincing. If you have got to be physically within the state to vote, why do millions of people get enfranchised in that way? Doesn't that cause an equal protection problem?

Why is it that citizens who live on every other piece of federal jurisdiction, every federal enclave, get the right to vote, but not people who live within the federal jurisdiction that is the District of Columbia? It does not make any sense. There is no rationality here.

Now several points for Judge Markman. First of all, being thirty-five years old myself, I liked his point about the Constitution requiring that you be thirty-five years old to be elected president. But it cuts completely against his argument. Could Congress say that people who were thirty-five years old and above in the District of Columbia can't run for president? I think not. In other words, whether you are thirty-five in D.C. or you are thirty-five in California, you have a right to run for president. We are talking about the literal terms of the Constitution.

Their argument does not advance beyond what Professor Gardner said this morning, which is he predicts that the government will say that the whole case is solved by the word "States" in the Constitution.

Yet this fails to address the point that Congress treats the District as though it *were* a state for more than 500 purposes, from highway funds to selective service to education funds, for constitutional purposes, from the right of people to sue each other across state lines, the Full Faith and Guarantee Clause, the First Amendment, the Second Amendment, the Third Amendment, the Fourth Amendment, and so on and so forth.[132]

In fact, I challenge them to find other constitutional purposes outside of voting and representation where the District of Columbia is *not* treated as though it were a state. So the question is not how *can* it be treated like a state in the case of voting representation, but why should it *not* be treated like a state for the purposes of voting representation when it is treated, and functions, like a state for almost every other purpose.

Now Judge Markman makes a serious point: what about denial of equal suffrage of the states in the Senate? But every precedent we have on that says all this provision means is that you can't give one of the states more senators than another state. That is the way that that has

132. *See* Raskin, *supra* note 1, at 34-42.

always been interpreted.[133]

He also says that the District Clause intended to create a district which will be under control of Congress so Congress could govern the city. We are not challenging that premise. Federal representation for District residents and federal control over the District are not incompatible. Congress can close Pennsylvania Avenue even if everybody in Washington doesn't want it closed. Congress clearly has that authority under the District Clause.

But because of the principle of popular sovereignty, democratic control, one person, one vote, the people of the District of Columbia have got to be represented in Congress, even if they are out-voted 435 to one. But Washingtonians still, as Professor Butler says, have to have a seat at the table.

In the final analysis, the argument reminds me of what President Lincoln and Daniel Webster used to talk about, as the political and constitutional philosophy that tried to trap African American slaves and freeze injustice permanently. Here is what Webster said:

> They have him in this prison house. They have searched his person, and they have left no prying instruments with him. One after another, they have closed the heavy iron doors upon him. Now they have him, as it were, bolted in with a lock of 100 keys which can never be unlocked without the concurrence of every key, the keys in the hands of 100 different men, and they are scattered to 100 different and distant places. No one is responsible for the injustice. They stand musing as to what invention in all of the dominions of mind and matter can be produced to make the impossibility of his escape more complete than it is.[134]

Our adversaries here would like to turn the Constitution into a straitjacket, a "prison house." But our Constitution is not that; it is a freedom charter, the expression of our nation's enduring commitment to democratic self-government.

JUDGE MARKMAN: Well, judging by Professor Raskin's rebuttal, I have failed to persuade him. I am disappointed about that. Let me make several random points, if I may. First, as I suggested in my initial remarks, while District of Columbia citizens do share the same essential characteristics of the citizens of the states, the problem is that the District itself as a political entity does not share the essential characteristics of the states. This is what is critical under our Constitution.

More importantly, the District of Columbia lacks the independence

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133. *See id.* at 39-43.

134. DAVID HERBERT DONALD, LINCOLN 201-02 (1995) (quoting Daniel Webster).

of the States. It lacks the sovereignty of the states. It lacks the interest in the preservation of federalist values of the states. Also, the District is far more homogenous in the employment of its people and in its economic base than any of the fifty states. It has a single industry, which is government. It has a size, geography, and population, which is unlike the states. It has a financial dependence upon the national government which is unlike the states.

So again I emphasize it is not the characteristics of the people of the District, but the political characteristics of the District of Columbia itself that make it inappropriate to be accorded representation without statehood. Now if we were to grant it statehood, of course, this would be an entirely different constitutional question.

Second, let me also note—and I understand there might be considerable disagreement with this—that while District of Columbia residents are not represented in a traditional sense in the Congress, I would submit there is at least an argument to be made that, in reality, they have at least as much effective influence in the affairs of the nation as, say, the citizens of Des Moines or Dubuque.

I say this based on the influence that the District of Columbia has on members of Congress effected through their newspapers, effected through the fact that members themselves live in their midst, effected by their proximity to Congress, effected by the nature of the employment of its citizens, and effected by the fact that Congress has several committees devoted entirely to its affairs.

I quote in this respect from James Madison, who said, "Those who are most adjacent to the seat of legislation in the seat of government will always possess advantages over others and earlier knowledge of the laws, a greater influence in enacting them, better opportunities for anticipating them, and a thousand other circumstances will give a superiority to those who are not thus situated."[135]

Third, with respect to Professor Butler, we can all argue about competing values of government and what kind of equilibrium ought to be struck between these values and which are more and which are less important. However, let me emphasize that the gist of my remarks is not that of competing values.

Rather, the issue is that of text. Article I, Section Three, Article I, Section Four, Article V and the Twenty-third Amendment are not "ambiguous," with all due respect to Professor Raskin, nor do I think it is a "pinched" interpretation of these provisions to say that, "States" mean "States."

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135. 12 THE PAPERS OF JAMES MADISON 329 (Charles Hobson & Robert Rutland eds., 1981).

This is ultimately what I am focusing on—not on the matter of competing values where I might draw a slightly different balance than Professor Butler, but rather on the black and white language of the Constitution.

In particular, I strongly disagree with Professor Butler's suggestion that no one really believes that a court will decide the issue of this lawsuit on the basis of the language in Article I of the Constitution. Well, of course I do. I would hope that, as law students, all of you would operate under this premise. If we don't accept this premise, then we should be considerably concerned about the direction in which our legal system is headed. I think Professor Butler's is a rather cynical view. In fact, if judges deciding this controversy do not decide it on the basis of the express language of Article I and the other provisions of the Constitution that have been cited, then they are clearly violating their oath of office.

Finally, let me suggest that of all people who are dependent upon a written, certain, clear Constitution—and our history should have demonstrated this—it is the racial and ethnic minorities in this country. Now I do not think this is a racial issue, although the issue of race has been repeatedly injected into this. From 1800 until 1950, a majority of the people living in the District were white, and we had the same constitutional arrangements for the District that we do today.

But, if you do want to look at this issue through a racial prism, then there is no group of individuals in our society who are more dependent upon respect for a clear, consistent constitution, and more dependent upon judges interpreting that Constitution in a faithful and honorable manner, as opposed to transforming it in response to highly creative arguments,[136] than racial and ethnic minorities.

Thank you very much.

HOST: Again, I would like to thank our panelists and our debaters for that very interesting approach to this issue. I know that many of you have questions and comments regarding their arguments. We will have the opportunity to discuss those in our second panel discussion after lunch.

A lunch has been prepared for us, and it is available in the dining hall directly past the doors. At that time, Professor Raskin will introduce our keynote speaker.

(Whereupon, a luncheon recess was taken.)

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136. *See, e.g., Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873).